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December 21, 2023

Via ECF

Honorable Frederic Block
United States District Court
Eastern District of New York
225 Cadman Plaza East
Brooklyn, NY 11201

Re: Blain v. State University of New York Downstate Medical Center
Case No. 1:22-cv-03022-FB-MMH

Dear Judge Block:

This firm represents Dr. Mark Stewart, who the Court dismissed from the above-captioned case in a Memorandum and Order dated December 8, 2023. *See* Dkt. 110. We write briefly to respond to Plaintiff's counsel's surprising claim that Plaintiff has a right to amend her complaint as of course. *See* Dkt. 111 (Dec. 20, 2023 Ltr. from Plaintiff's counsel).

Under Fed. R. Civ. P 15(a)(1)(B), which Plaintiff claims applies, an amendment as of course must be made within "21 days after service of a motion under Rule 12(b), (e), or (f)." Here, following the November 16, 2023 pre-motion conference, Dr. Stewart moved to dismiss the Amended Complaint under Rule 12(b) on November 22, 2023. *See* Dkt. 105 ("Dr. Stewart respectfully requests that the Court dismiss the claims against him."). The other defendants filed motions to dismiss on November 24, 2023. *See* Dkt. 106, 107. More than 21 days have passed since those motions were filed. Therefore, under Rule 15(a)(1)(B), Plaintiff is foreclosed from amending her complaint for a second time.

To the extent Plaintiff intends to argue that Defendants' motions did not trigger Rule 15(a)(1)(B)'s time limitation, that argument is meritless and entirely contrary to the Court's efforts to streamline the motion practice in this case. At the pre-motion conference, the Court directed the parties to brief the Defendants' motions to dismiss by letter, with Defendants filing moving letters and Plaintiff filing a responsive letter. The parties followed the Court's direction, the Court held a conference, and then the Court ruled on the motion. The Court employed this procedure to expedite the briefing process so it could resolve the motions quickly. It would hardly be efficient if the motion practice the Court ordered were deemed a nullity for purposes of

applying Rule 15(a)(1)(B) and Plaintiff retained both an opportunity to oppose the motions to dismiss *and* amend her complaint as of right.

Rule 15(a)(1)(B) limits a pleader's time to amend as of right in response to a Rule 12(b) motion in order to "force the pleader to consider carefully and promptly the wisdom of amending to meet the arguments in the motion." Fed. R. Civ. P. 15 advisory committee's notes to 2009 amendment. Plaintiff could have sought to amend her complaint in response to Dr. Stewart's arguments in favor of dismissal.¹ Instead, she chose to oppose his motion, and the Court ruled in Dr. Stewart's favor. Under Rule 15(a)(1)(B), the consequence of her decision is that she can no longer amend her complaint as of right.

In addition, as Plaintiff acknowledges, she has already amended her complaint once in this case. Courts in this Circuit have held that Rule 15(a)'s plain language—which allows an amendment "once as a matter of course"—does not permit a second amended complaint as a matter of course. *See Davis v. Sedgwick Claims Mgmt. Servs. Inc.*, No. 21-cv-7090, 2023 WL 6150009, at *12 (S.D.N.Y. Aug. 30, 2023); *Adams v. Tops Markets, LLC*, 21-cv-753, 2023 WL 4828029, at *2 (W.D.N.Y. July 7, 2023).

For the foregoing reasons, Dr. Stewart respectfully requests that Plaintiff not be permitted to amend her complaint as a matter of course. Dr. Stewart reserves the right to raise additional arguments in response to any motion Plaintiff may make for leave to amend her complaint.

Respectfully submitted,

/s/ Samuel Shapiro

Samuel Shapiro

Sarah Mac Dougall

c: All Counsel of Record via ECF

¹ In fact, Plaintiff has been aware of Dr. Stewart's arguments in favor of dismissal since July 26, 2023, when he filed a letter seeking a pre-motion conference. *See* Dkt. 91.